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SUPREME COURT, U. S.

No. 73-1284

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

Supreme Court, U. S.
FILED
FEB 20 1974
MICHAEL RODAK, JR., CLERK

Michael N. Mervin, Petitioner

v.

Federal Trade Commission

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE UNITED STATES SUPREME COURT

October Term, 1973

No.

Michael N. Mervin, Petitioner

v.

Federal Trade Commission

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, appearing as Counsel pro se, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

There were no opinions below, either reported or unreported.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on January 16, 1974.

The jurisdiction of this Court is in-

voked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether failure to exhaust an unavailable and constitutionally inadequate administrative remedy, which is not a statutory prerequisite to any judicial review, constitutes a proper ground for dismissal for lack of jurisdiction of the subject matter under 28 U.S.C. Rule 12(h)(3)FR Civ. P.

CONSTITUTIONAL PROVISIONS,
RULES, STATUTES, AND REGULATIONS INVOLVED

The Constitution of the United States, Amendment V (Vol. 1 USC, U.S.C.A. Const. Amend. 4) provides: "No person shall ... be deprived of life, liberty, or property, without due process of law ... ."

Rule 12(h)(3) F.R. Civ. P. reads: Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

5 U.S.C. 706 provides in pertinent part: "The reviewing court shall ... set aside agency action ... found to be --

(A) arbitrary, capricious ... ."

5 U.S.C. 3502(a) reads:"The Civil Service Commission shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to --

(1) tenure of employment;

(2) military preference ...

(3) length of service; and

(4) efficiency of performance ratings."

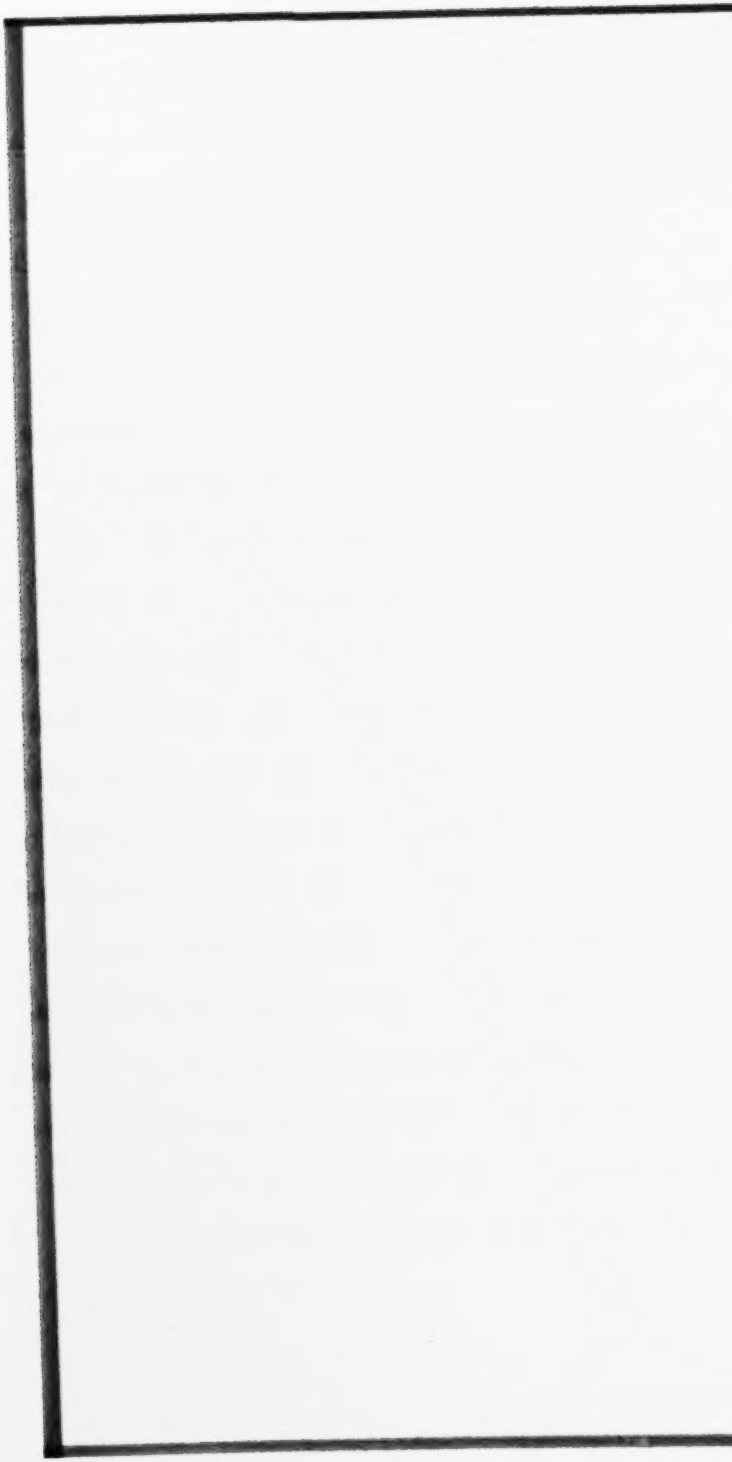
5 CFR 351.901(a) specifies appellate rights of a RIF-ed employee: "An employee who has received a notice of specific action and who believes this part has not been correctly applied may appeal to the Commission ... ."

5 CFR 351.802 describes the notice requirements: "... the notice ... shall state ... the employee's competitive area, competitive level, subgroup, and service date ... and the employee's appeal rights ... ."

STATEMENT

I brought an action in the US District Court for the District of Columbia on April 6, 1971, under 28 U.S.C. 1346(a)(2), for three vio-

lations of the constitutional due process, consisting in an arbitrary discharge, deprivation of property and, possibly, life without due process, and nondisclosure of information. In January 1973, FTC made an oral, fraudulent "suggestion of lack of jurisdiction pursuant to Rule 12(h)(3) on the ground that plaintiff failed to exhaust available administrative remedies ... ." Though the District Judge ordered FTC on January 8, 1973, to file a memorandum to back up its suggestion, FTC never submitted a single word to either court in support of its naked assertion but it did submit a lengthy memorandum to the District Judge that had absolutely nothing to do with its suggestion. Nevertheless, on January 19, 1973, the District Judge dismissed the case for lack of "subject matter jurisdiction of this cause" due to failure to "exhaust his administrative remedies in regard to his alleged claims." On January 16, 1974, the court of appeals affirmed the "judgment" of the District Court without any opinion and without any oral argument.



REASONS FOR THE ALLOWANCE OF THE WRIT

The judgment represents a radical change in the established law that has a direct and substantial impact on job security of millions of government employees. It is a decision of first impression converting the heretofore discretionary judicial policy -- a product of self-restraint -- of requiring exhaustion of available and adequate administrative remedies, which are not statutory conditions precedent to a suit, into a mandatory dismissal under Rule 12(h)(3) due to absolute lack of jurisdiction of the subject matter for failure to exhaust administrative remedies in all situations, regardless of whether they are available or not, and, if available, irrespective of their adequacy.

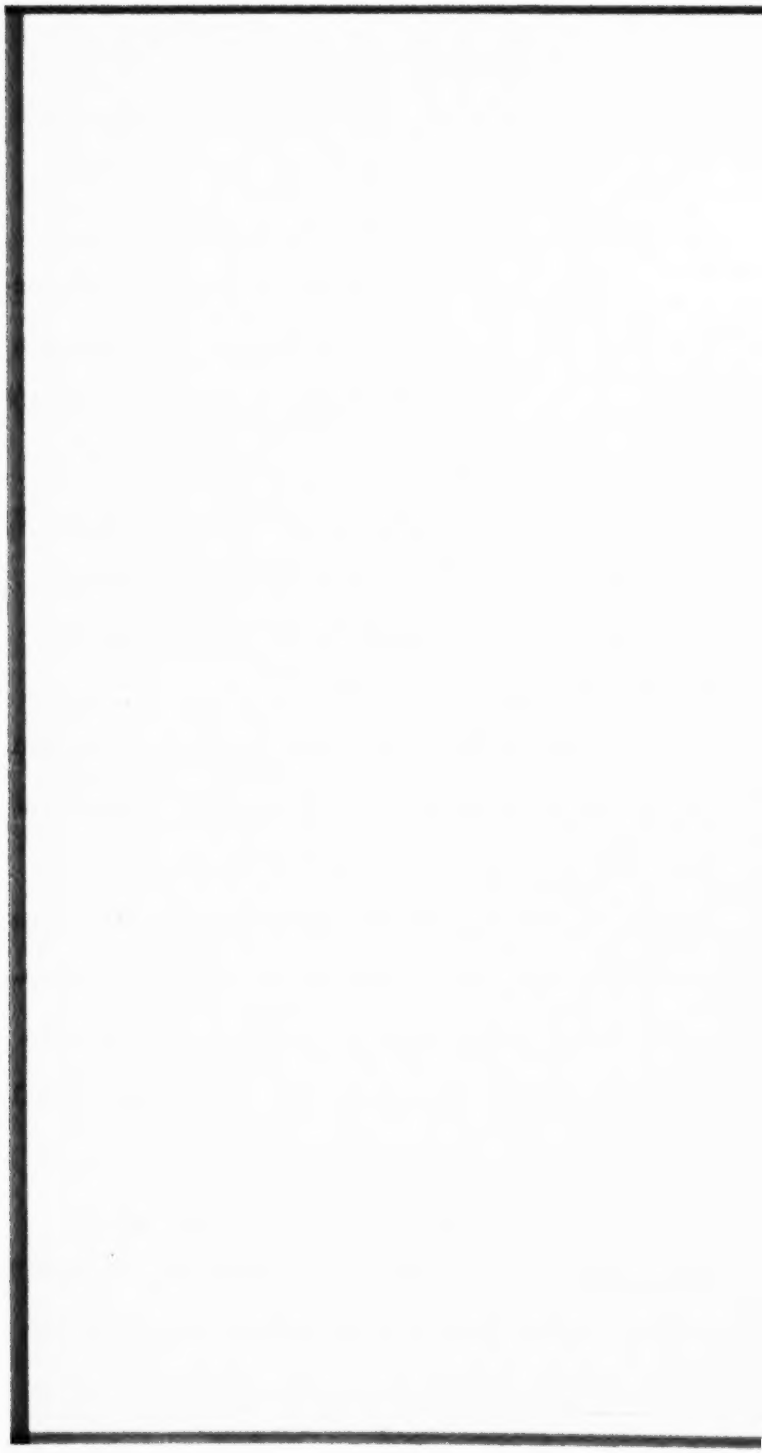
The judgment is in conflict with the decisions of the eighth circuit (Glover v. United States, 286 F 2d 84, 88 (CA8 1961) and of the Court of Claims (Cuiffo v. United States, 137 F. Supp. 944, 946-7 (Ct.Cl. 1955) and Adler v. United States, 146 F.Supp. 956, 958 (Ct.Cl. 1956)), as well as its own previous decisions (Bannercraft Clothing Co. v. Renegotiation Board, __ US App DC

__, 466 F 2d 345, 354 (1972); Sohn v. Waldor, 124 US App. DC 382, 385, 365 F. 2d 915, 918 (1966); and Ogden v. Zuckert, 298 F 2d 312 (1961).

Moreover, it has decided a federal question in a way that is in conflict with applicable decisions of this Court: Baker v. Carr, 369 US 186, 198 (1962); Natural Gas Co. v. Slattery, 302 US 300, 311 (1937); United States v. Abilene & So. Ry Co., 265 US 274, 282 (1924); Levers v. Anderson, 326 US 219 (1945); McKart v. United States, 395 US 185, 193-195, 197 (1969).

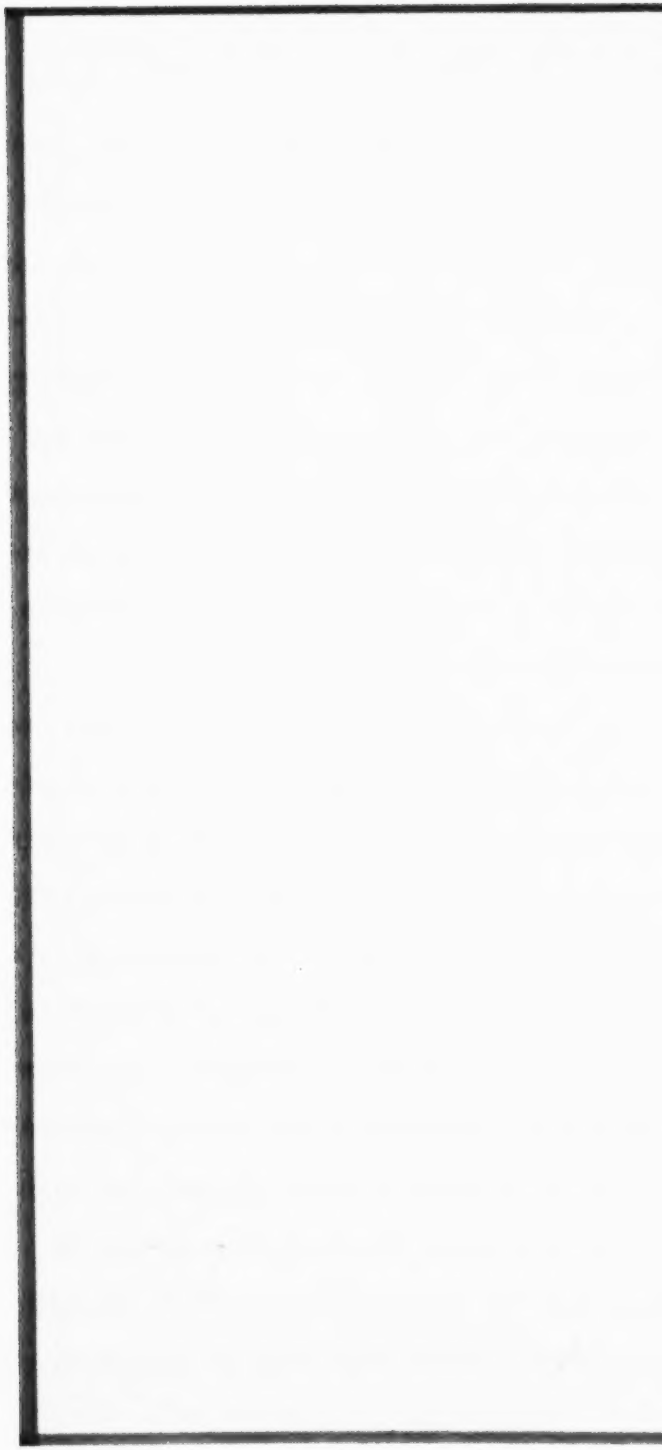
While this important question of federal law was settled before by the express language of Rule 12(h)(3) and all related decisions of all courts, it has now become unsettled and should be settled by this court because of its great importance to the life, liberty, and property of millions of federal employees, and indirectly of all state and local government employees.

The remedy was not available to the petitioner: FTC Director of Personnel, Bureau Director, Deputy Executive Director, Executive Di-



[illegible] memorandum of the FTC General Counsel) persuaded me that I had no right to appeal to the Civil Service Commission. The only judicial construction of 5 CFT 351.901(a) at issue is Lodge 1858, American Federation of Gov. Emp. v. Paine, 141 US App DC 152, 436 F 2d 882, 896 (1970), which interprets it to provide "corrective steps in instances of deviations" as to "particular employees" "subject to reduction in force."

Had I been RIF-ed, I would not have needed any judicial remedy, inasmuch as no stigma is attached to a RI F.Undoubtedly, I would have obtained another job within a short time. According to FTC brief for appellee, at p. 6:"Your separation is being effected as an administrative action pursuant to the Chairman's authority to terminate appointments of non-veteran employees in the excepted service." This does not contain a single element that might give rise to a claim of a deviation within the meaning of 5 CFR 351.802 and 901. There was nothing for the Civil Service Commission to determine, par-



'ticularly since FTC specifically stated to me, to my Congressman, and Senators, that my discharge was not a "reduction in force," without which I could have no right to appeal to the Civil Service Commission at all.

As the court below found (Fitzgerald v. Hampton, 467 F 2d 755, at 758 (CADC 1972), Sup. Ct. stay dissolved in A-605, 1/15/73), "Reduction-in-force procedures found in PART 351 ... do not provide for a hearing." The underlying reason for the absence of any hearing is that the only relevant question is what does the file say: If, e.g., an employee with unsatisfactory performance claims that a competing employee with an equally unsatisfactory performance was retained, the only issues are the respective starting dates in the files. If, on the other hand, he goes beyond that and alleges that his performance was not unsatisfactory, 5 CFR 351.901(a) is not available to him because the question raised is outside the scope of Part 351, though he may have other, different remedies in other regulations.

It was the arbitrariness of my discharge -- which is completely outside the purview of 5 CFR 351.901(a) -- what deprived me of property. Even a crime can be explained away, but I have had no defense when I was repeatedly told that FTC would not have fired me if I were any good, in view of the fact that I have had no means of knowing or finding out why I was fired without a trial in the district court.

Apart from its unavailability, the remedy in question is inadequate: because it does not precede the discharge. "we find ... that plaintiff was entitled to some form of hearing before his discharge." Hostrop v. Board of Junior College Dist. No. 515, 471 F 2d 488, 494 (CA7 1972). "Each case mandates a hearing before government action is initiated which might cause a deprivation." Scarpa v. US Board of Parole, 477 F. 2d 278, 282 (CA5 1973). "We have concluded that a hearing before plaintiff's discharge was an essential element of procedural due process ... ." Commonwealth of Pa. v. Philadelphia Psychiatric Center, 356 F. Supp. 500, at 509 (E.D.

Pa. 1973). "... the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." Fuentes v. Shevin, 407 US 67, 82, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). "Kennedy was therefore entitled to a hearing prior to his discharge." Kennedy v. Sanchez, 72 C 771, at 4 (ND Ill., October 24, 1972). Bell v. Burson, 402 US 535, 542, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971) requires a hearing before suspension of uninsured motorists' licenses. Wisconsin v. Constantineau, 400 US 433, 91 S. Ct., 507, 27 L. Ed. 515 (1971) requires a hearing before posting of notice forbidding sale of liquor to an individual. Goldberg v. Kelly, 397 US 254, 264, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) requires a notice and a hearing before termination of welfare benefits. Sniadach v. Family Finance Corp., 395 US 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) requires a hearing before garnishment of wages.

Furthermore, it has been held that the presence of a constitutional question precludes

dismissal for failure to exhaust administrative remedies, even where they are available: Aircraft & Diesel Corp. v. Hirsch, 331 US 752, 773 (1947). Accord, Mosher v. Phoenix, 287 US 29, 31-32 (1932); Town of East Haven v. Eastern Airlines, Inc., 282 F. Supp. 507, 515-516 (DC Conn. 1968); Unglesby v. Zimny, 250 F. Supp. 714, 717 (DC Cal. 1965).

This landmark decision will be a powerful weapon in the hands of the US Attorney in DC, but will be unknown and unknowable to the Government employees affected thereby in the absence of any opinion on any level.

CONCLUSION

This petition for a writ of certiorari ought to be granted.

Respectfully submitted.

Michael N. Mervin,

Attorney pro se

February 1974.

App. A

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1330

(No Opinion)
September Term, 19 73
Civil Action 679-71

Michael N. Nervin, Appellant

v.

Federal Trade Commission

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 16 1974

HUGH E. KLINE
CLERK

Appeal from the United States District Court for the District of Columbia.

Before: Bazelon, Chief Judge, Tamm, Circuit Judge and Wyzanski,* United States Senior District Judge for the District of Massachusetts

JUDGMENT

This cause came on for consideration on the record on appeal from the United States District Court for the District of Columbia, and briefs were filed herein by the parties. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. *See* Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged by this Court that the judgment----------of the District Court appealed from in this cause is hereby affirmed.

Per Curiam
For the Court

Hugh E. Kline
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 294(d)

FOR 81—5-27-71-20-4567

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

App. B

ICHAEL N. MERVIN,)

Plaintiff,)

v.) Civil Action No. 679-71

EDERAL TRADE COMMISSION,)

Defendant.)

FILED
JAN 19 1973
JAMES F. DAVEY, Clerk

O R D E R

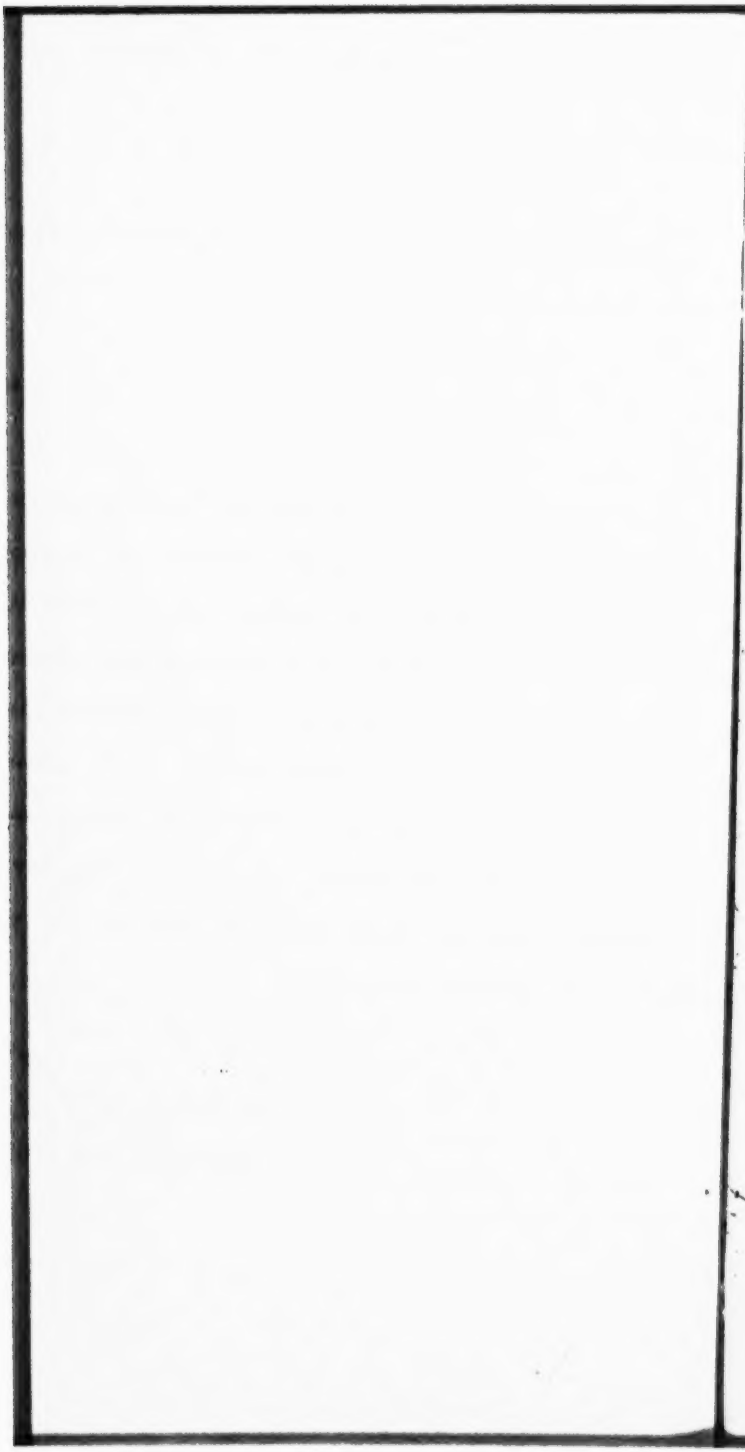
Upon consideration of the parties' cross-motions for summary judgment, the memoranda in support thereof and in opposition thereto, the argument of Plaintiff and counsel for the Defendant, and the undisputed record herein that Plaintiff at the time of his discharge from the Federal Trade Commission did not exhaust his administrative remedies in regard to his alleged claims, it is apparent that this Court lacks subject-matter jurisdiction of this cause.

In light of the foregoing, it is, this 18th day of January, 1973,

ORDERED, that the above-entitled case be, and the same hereby is Dismissed, without prejudice.

Charles R. Richey

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JAN - 8 1973
JAMES F. DAVEY, Clerk

MICHAEL N. MERVIN,
Plaintiff,
v.
FEDERAL TRADE COMMISSION,
Defendant.

Civil Action No. 679-71

ORDER

This matter having come before the Court for a status hearing on January 5, 1973, and plaintiff having made an oral motion for judgment for failure of defendant to respond to his motion for summary judgment within the time prescribed by Local Rule 9, and defendant having made a suggestion of lack of jurisdiction pursuant to Rule 12(h)(3) on the ground that the plaintiff failed to exhaust available administrative remedies on the claim he makes in his motion for summary judgment, and it appearing to the Court that defendant had previously filed a motion for summary judgment which constitutes sufficient opposition to plaintiff's motion, it is by the Court this 8th day of January, 1973,

ORDERED that plaintiff's oral motion for judgment pursuant to Local Rule 9 be and it hereby is denied, and it is further

ORDERED that defendant shall have to and including January 12, 1973 to file a memorandum on the jurisdictional issue of failure to exhaust administrative remedies, and that plaintiff shall have to and including January 19, 1973 to respond to said memorandum.

Charles R. Richey
UNITED STATES DISTRICT JUDGE